(2) ORIGINAL

No. 94-7254

IN THE UNITED STATES SUPREME COURT

OCTOBER TERM, 1994

Supreme Court, U.S.
FILED
4 1994
OFFICE OF THE CLERK

TERRY DWIGHT BARBER,

Petitioner

v.

STATE OF TENNESSEE,

Respondent

PETITION FOR WRIT OF CERTIORARI TO THE TENNESSEE SUPREME COURT AND TENNESSEE COURT OF CRIMINAL APPEALS, WESTERN DIVISION

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65 pp

QUESTIONS PRESENTED FOR REVIEW i

TABLE OF CONTENTS ii

TABLE OF AUTHORITIES iv

OPINIONS BELOW 1

JURISDICTIONAL STATEMENT 1

CONSTITUTIONAL PROVISIONS INVOLVED 2

STATEMENT OF THE CASE AND STATEMENT OF FACTS 2

REASONS COMPELLING REVIEW 6

I. IN THE LOWER COURTS, THERE IS GROWING CONFUSION ABOUT THE PROPER STANDARD FOR DETERMINING WHEN A JURY'S WEIGHING OF AN INVALID AGGRAVATING CIRCUMSTANCE CONSTITUTES "HARMLESS ERROR" 7

A. AFTER INVALIDATING A STATUTORY AGGRAVATING CIRCUMSTANCE, ABSENT REWEIGHING, A STATE APPELLATE COURT MUST APPLY CHAPMAN HARMLESS-ERROR ANALYSIS .. 7

B. THE TENNESSEE SUPREME COURT DID NOT APPLY CHAPMAN CONSTITUTIONAL HARMLESS-ERROR ANALYSIS 9

C. THERE IS GROWING CONFUSION CONCERNING THE PROPER STANDARD OF REVIEW 12

1. THIS COURT HAS ISSUED CONFLICTING PRONOUNCEMENTS CONCERNING THE PROPER STANDARD OF REVIEW IN BOTH STRINGER AND CLEMONS 12

2. THE LOWER COURTS ARE APPLYING DIVERGENT STANDARDS OF REVIEW, AND MANY ARE NOT STRICTLY APPLYING CHAPMAN 13

D. THIS COURT SHOULD GRANT THE PETITION TO RESOLVE THE GROWING CONFLICT OVER THE PROPER STANDARD OF REVIEW 16

II. A JURY MAY NOT IMPOSE A DEATH SENTENCE BASED ON A FINDING THAT A MURDER IS "HEINOUS, ATROCIOUS, OR CRUEL IN THAT IT INVOLVED TORTURE OR DEPRAVITY OF MIND" 17

CONCLUSION AND PRAYER FOR RELIEF 21

CERTIFICATE OF SERVICE .....

APPENDICES

APPENDIX A (Tennessee Court of Criminal Appeals Opinion) .....

APPENDIX B (Tennessee Supreme Court Order Granting Permission To Appeal) ...

APPENDIX C (Tennessee Supreme Court Opinion) .....

APPENDIX D (Tennessee Supreme Court Order Denying Rehearing) .....

TABLE OF AUTHORITIES

CASES

Adamson v. Ricketts, 865 F.2d 1011 (9th Cir. 1988)(en banc), cert. denied 497 U.S. 1031 (1990) 18

Terry D. Barber v. State, (Tenn. Dec. 28, 1992)(per curiam) (on application for permission to appeal) 1, 5

Terry D. Barber v. State of Tennessee, ___ S.W.2d ___ (Tenn. Oct. 3, 1994) ..... passim

Terry D. Barber v. State of Tennessee, No. 02S01-9212-CC-00086 (Tenn. Cr. App. May 13. 1992) 1

Terry D. Barber v. State of Tennessee, slip op. (Tenn. Nov. 28, 1994)(per curiam) 1,6

Boyde v. California, 494 U.S. 370 (1990) 9

Brecht v. Abrahamson, 507 U.S. ___, 113 S.Ct. 1710 (1993) 8, 16

Calderon v. Wade, U.S. No. 94-761 (pet. for cert. filed Oct. 26, 1994) 17, 20, 21

Carella v. California, 491 U.S. 263 (1989) 9

Cartwright v. Maynard, 822 F.2d 1477 (10th Cir. 1987)(en banc), aff'd, 486 U.S. 356 (1988) 18

Cazes v. Tennessee, U.S. No. 94-6270 (cert. filed July 5, 1994) 21

Chapman v. California, 386 U.S. 18 (1967) ..... passim

Clemons v. Mississippi, 494 U.S. 738 (1990) ..... passim

Coleman v. Saffle, 869 F.2d 1377 (10th Cir. 1989), cert. denied 494 U.S. 1090 (1990) 13

Colorado v. Rodriguez, 794 P.2d 965 (Colo. 1990), cert. denied 498 U.S. 1055 (1991) 15, 16

Connecticut v. Johnson, 460 U.S. 73 (1983) 9

Cozzolino v. State, 584 S.W.2d 765 (Tenn. 1979) 11

Dawson v. Delaware, 608 A.2d 1201 (Del. 1992) 14

Deutscher v. Whitley, 884 F.2d 1152 (9th Cir. 1989) 19

Feltrop v. Missouri, 501 U.S. 1262 (1991) 7

Godfrey v. Georgia, 446 U.S. 420 (1980) 17, 18

Gregg v. Georgia, 428 U.S. 153 (1976) 18

Illinois v. Pitsonbarger, 142 Ill. 2d 353 (1990),
cert. denied 112 S.Ct. 204 (1991) 15

Jones v. State, 602 So.2d 1170, 1172 (Miss. 1992) 15

Lawhorn v. State, 581 So.2d 1159, 1176 (Ala. Cr. App. 1990),
aff'd 581 So.2d 1179 (Ala. 1991), cert. denied 112 S.Ct. 445 (1991) 14

Lewis v. Jeffers, 497 U.S. 764 (1990) 2

Maynard v. Cartwright, 486 U.S. 356 (1988) 16, 17

McKenzie v. Montana, 449 U.S. 1050 (1980) 13

Newlon v. Armontrout, 885 F.2d 1328 (8th Cir. 1989),
cert. denied 497 U.S. 1038 (1990) 19

Norris v. Starr, U.S.No. 94-470, cert. denied ___ U.S. ___ (Nov. 8, 1994) 16

O'Neal v. McAninich, U.S. No. 93-7407, cert. granted, 114 S.Ct. 1396 (April 4, 1994) 16, 21

Pensinger v. California, 502 U.S. ___, 112 S.Ct. 351 (1991) 7

Pinkney v. State, 602 So.2d 1177 (Miss. 1992) 15

Preston v. State, 564 So.2d 120 (Fla. 1990) 15

Price v. North Carolina, 114 S.Ct. 2777 (1994) 10, 16

Reeves v. State, 239 Neb. 419 (1991),
cert. denied 113 S.Ct. 114 (1992) 14

Richmond v. Lewis, 506 U.S. ___, 113 S.Ct. 528 (1993) 7, 16

Rickman v. Dutton, 854 F.Supp. 1305 (M.D.Tenn. 1994) 9

Satterwhite v. Texas, 486 U.S. 249 (1988) 8

Schere v. Florida, 579 So.2d 86 (Fla. 1991) 14

Shell v. Mississippi, 498 U.S. 1 (1990)(per curiam) ..... passim

Smith v. United States, 502 U.S. ___, 112 S.Ct. 667 (1991) 11

Sochor v. Florida, 504 U.S. ___, 112 S.Ct. 2114 (1992) ..... passim

State v. Archuleta, 850 P.2d 1232 (Utah 1993),
cert. denied 114 S.Ct. 476 (1993) 15

State v. Barber, 753 S.W.2d 659 (Tenn. 1988),
cert. denied, 488 U.S. 900 (1988) 4

State v. Bobo, 727 S.W.2d 945 (Tenn. 1987) 9

State v. Burlison, 868 S.W.2d 713 (Tenn. Cr. App. 1993) 9

State v. Howell, 868 S.W.2d 238 (Tenn. 1993) 6

State v. Middlebrooks, 840 S.W.2d 317 (Tenn. 1992) 5

State v. Moore, 614 S.W.2d 348 (Tenn. 1981) 9

State v. Pritchett, 621 S.W.2d 127 (Tenn. 1981) 9

State v. Terry, 813 S.W.2d 420 (Tenn. 1990) 9

State v. Williams, 690 S.W.2d 517 (Tenn. 1985) 9

Stringer v. Black, 503 U.S. ___, 112 S.Ct. 1130 (1992) 7, 11, 12

Stromberg v. California, 283 U.S. 359 (1931) 20

Sullivan v. Louisiana, 508 U.S. ___, 113 S.Ct. 2078 (1993) 8, 9

Wade v. Calderon, 29 F.3d 1312 (9th Cir. 1994),
cert. pending sub nom. Calderon v. Wade, (U.S. No. 94-761) 14, 19

Walton v. Arizona, 497 U.S. 639 (1990) 19, 20

White v. Dugger, 972 F.2d 1218 (11th Cir. 1992) 13

Wilcher v. State, 635 So.2d 789 (Miss. 1993) 10

Wiley v. Puckett, 969 F.2d 86 (5th Cir. 1992) 20

Williams v. Clarke, ___ F.3d ___, No. 93-2733 (8th Cir. Dec. 2, 1994) 13

Yates v. Evatt, 500 U.S. 391 (1991) ..... passim

Zant v. Stephens, 462 U.S. 862 (1982) 20

CONSTITUTIONAL PROVISIONS

U.S.Const. Amend VIII ..... passim

U.S.Const. Amend XIV ..... passim

STATUTES AND RULES

28 U.S.C. §§ 1257 1

28 U.S.C. §§ 1651 1

Tenn R. App. P. 11 4

Tenn. Code Ann. § 39-3-203(i)(5)(1982 ed.) 2

Tenn. Code Ann. § 39-3-203(i)(7)(1982 ed.) 2, 5

OTHER AUTHORITIES

Carter, "Harmless Error In The Penalty Phase Of A Capital Case:
A Doctrine Misunderstood And Misapplied," 28 Ga. L.Rev. 125 (1993) 12, 13

OPINIONS BELOW

On May 13, 1992, the Tennessee Court of Criminal Appeals rendered judgment in an unpublished opinion. Terry D. Barber v. State of Tennessee, No. 02S01-9212-CC-00086 (Tenn. Cr. App. May 13. 1992)(Attached as Appendix A).[1] On December 28, 1992, the Tennessee Supreme Court found that the jury's consideration of a felony-murder aggravating circumstance was unconstitutional, and granted Barber permission to appeal the Court of Criminal Appeals' judgment, limited to the question whether consideration of the unconstitutional aggravating circumstance was "harmless error." Barber v. State of Tennessee, (Tenn. Dec. 28, 1992)(per curiam)(Attached as Appendix B).[2]

On October 3, 1994, the Tennessee Supreme Court denied relief in an opinion designated for publication. Barber v. State of Tennessee, ___ S.W.2d ___ (Tenn. Oct. 3, 1994)(Attached as Appendix C).[3] On November 28, 1994, in an unpublished order, the Tennessee Supreme Court denied a petition to rehear. Barber v. State of Tennessee, slip op. (Tenn. Nov. 28, 1994)(per curiam)(Attached as Appendix D).[4]

JURISDICTIONAL STATEMENT

This Court has jurisdiction under 28 U.S.C. §§ 1257 and 1651. The Court of Criminal Appeals' judgment issued May 13, 1992. The Tennessee Supreme Court rendered judgment on October 3, 1994. The Tennessee Supreme Court denied rehearing on November 28, 1994.

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[1] The opinion is also available at 1992 Tenn. Crim. App. LEXIS 411

[2] This opinion is available at 1992 Tenn. LEXIS 726.

[3] This opinion is also available at 1994 Tenn. LEXIS 276.

[4] This opinion is also available at 1994 Tenn. LEXIS 339.

CONSTITUTIONAL PROVISIONS INVOLVED

U.S.Const. Amend. VIII provides: "Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted."

U.S.Const. Amend. XIV provides, in pertinent part: "No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

STATEMENT OF THE CASE AND STATEMENT OF FACTS

I.

On July 19, 1986, Petitioner Terry Dwight Barber was convicted of first-degree felony murder in the Criminal Court of Lake County, Tennessee. Following a capital sentencing hearing, the jury was instructed that it could impose a sentence of death if it found that the murder was either: (1) committed during the perpetration of a felony (Tenn. Code Ann. § 39-3-203(i)(7)(1982 ed.)); or (2) "heinous, atrocious or cruel in that it involved torture or depravity of mind." (Tenn. Code Ann. § 39-3-203(i)(5)(1982 ed.)). T.R. 170.[5]

The "heinous, atrocious, or cruel" circumstance was phrased in the disjunctive, thus permitting a death sentence if the jury found that the offense was either "heinous," "atrocious," or "cruel." Cf. Lewis v. Jeffers, 497 U.S. 764, 792 (1990)(Blackmun, J., dissenting)(when phrased in disjunctive, "heinous, atrocious, or cruel" aggravating circumstance properly characterized as three factors, rather than one). The trial court provided the following additional definitions of the terms "heinous," "atrocious," or "cruel":

[5] The Technical Record of the trial will be cited as T.R. ____.

Heinous	--	Grossly wicked or reprehensible; abominable; odious; vile.
Atrocious	--	Extremely evil or cruel; monstrous; exceptionally bad; abominable
Cruel	--	Disposed to inflict pain or suffering; causing suffering; painful

T.R. 169. The trial court also provided the following instructions concerning the meaning of "torture" and "depravity of mind":

Torture	--	The infliction of severe physical pain as a means of punishment or coercion; the experience of this; mental anguish; any method or thing that causes such pain or anguish; to inflict with great physical or mental pain
Depravity	--	Moral corruption; wicked or perverse act

T.R. 169-170.

The jury instructions made clear that a finding of either "torture" or "depravity of mind" was required before the jury could rely upon this circumstance: "To show that the murder was especially heinous, atrocious, or cruel, the state must prove beyond a reasonable doubt that the killing involved torture of the victim or depravity of mind of the killer." T.R. 170. The instructions emphasized that "torture" and "depravity of mind" provided alternative bases to support this aggravating circumstance:

> Torture means the infliction of severe physical or mental pain upon the victim while he or she remained alive and unconscious. Proof that such torture occurred also establishes that the murder involved depravity of mind of the murderer. Where the state fails to prove that such torture occurred, the state may offer to prove that the defendant possessed a depraved state of mind at the time of the killing. Depravity of mind means that the murderer's state of mind at the time must have been wicked or morally corrupt.

T.R. 170. The jury was also instructed to weigh all aggravating circumstances against mitigating circumstances, and to impose a sentence of death if the mitigating circumstances were not sufficiently substantial to outweigh any aggravating factors found by the jury. T.R. 172.

The jury sentenced Barber to death, finding two aggravating circumstances: (1) that the murder was committed in the perpetration of a larceny, and (2) that the offense was "especially heinous, atrocious, or cruel in that it involved torture or depravity of mind." T.R. 167. On direct appeal, the Tennessee Supreme Court affirmed the felony-murder conviction and sentence of death. State v. Barber, 753 S.W.2d 659 (Tenn. 1988), cert. denied, 488 U.S. 900 (1988).

II.

On January 17, 1989, Terry Barber filed a *pro se* petition for post-conviction relief in the Circuit Court of Lake County, Tennessee. On May 1, 1990, counsel for Barber filed an Amended Petition for Post-Conviction Relief in the Circuit Court of Lake County, Tennessee. On May 10, 1990, the trial court denied the post-conviction petition.

The Tennessee Court of Criminal Appeals affirmed. Barber v. State (Appendix A). The Court held that Barber was not entitled to relief on his claim that the "heinous, atrocious, or cruel" aggravating circumstance was unconstitutionally vague. Id., slip op. at 6. The Court also rejected Barber's contention that, because he was convicted of felony-murder, it was unconstitutional to sentence him to death by using a felony-murder aggravating circumstance which was factually identical to the jury's felony-murder finding at the guilt phase. Id., slip op. at 7-8. On June 11, 1992, Barber petitioned the Tennessee Supreme Court for permission to appeal. See Tenn R. App. P. 11. Barber requested, *inter alia*, that the Tennessee Supreme Court review his claims that the "felony-murder" and "heinous, atrocious, or cruel" aggravating circumstances were unconstitutional.

Shortly thereafter, on September 8, 1992, the Tennessee Supreme Court decided State v.

Middlebrooks, 840 S.W.2d 317 (Tenn. 1992),[6] which held that the Tennessee and United States Constitutions prohibited a felony-murderer from being sentenced to death using Tennessee's identical felony-murder aggravating circumstance. On December 28, 1992, the Tennessee Supreme Court granted Barber's application for permission to appeal. Appendix B. Initially, the Court held that, under Middlebrooks, it was unconstitutional to apply the felony-murder aggravating circumstance to Barber, because he was convicted of felony murder. The Court ordered briefing and argument on the question "whether the application of the felony murder aggravating circumstance (i)(7) in this case should be considered harmless error . . . or whether this case, as in Middlebrooks, should be remanded for re-sentencing." Barber, Appendix B, slip op. at 1.

In his brief to the Tennessee Supreme Court, Barber maintained, *inter alia*, that consideration of the invalid felony-murder circumstance was not harmless beyond a reasonable doubt, and that the court was obliged to assess whether, beyond a reasonable doubt, the error contributed in any way to the death sentence. He also maintained that given the jury's error, Tennessee law precluded harmless-error review, and entitled him to a new sentencing hearing before a properly instructed jury.

On October 3, 1994, the Tennessee Supreme Court affirmed Terry Barber's death sentence. In affirming the death sentence, the Tennessee Supreme Court did not ask whether, under Chapman v. California, 386 U.S. 18 (1967), the weighing of the unconstitutional aggravating factor "was 'harmless beyond a reasonable doubt,' in that it did not contribute to the sentence

[6] cert. granted, 113 S.Ct. 1840 (1993), cert. dismissed as improvidently granted, 114 S.Ct. 651 (1993).

obtained." Sochor v. Florida, 504 U.S. ___, ___, 112 S.Ct. 2114, 2123 (1992). Rather, the Tennessee Supreme Court posited a standard of review derived from its earlier decision in State v. Howell, 868 S.W.2d 238 (Tenn. 1993): whether, beyond a reasonable doubt "the sentence would have been the same had the sentencing authority given no weight to the aggravating factor." Barber, Appendix C, slip op. at 6. Applying this standard, the Tennessee Supreme Court stated that given the facts of the offense, and the jury's finding of the "heinous, atrocious, or cruel" aggravating circumstance, a jury still would have imposed a death sentence. Barber, Appendix C, slip op. at 8-12. Thus, the Court found the error to be "harmless." Barber, Appendix C, slip op. at 12.

In his petition for rehearing, Barber maintained that the Tennessee Supreme Court's standard of review was erroneous. He again asserted that, under Tennessee law, once an aggravating circumstance was stricken, he was entitled to a new sentencing hearing before a jury. Barber further contended that affirmance of the death sentence was arbitrary, as his death sentence was infected with error but not reversed, while other similarly situated defendants had their sentences remanded for jury resentencing. Cf. Barber, Appendix C, slip op. at 5-7 (noting similar cases where Tennessee Supreme Court remanded for jury resentencing following improper use of felony-murder aggravating circumstance and existence of only one other aggravating circumstance). On November 28, 1994, the Tennessee Supreme Court denied Barber's rehearing petition. Appendix D (per curiam).

REASONS COMPELLING REVIEW

I. IN THE LOWER COURTS, THERE IS GROWING CONFUSION ABOUT THE PROPER STANDARD FOR DETERMINING WHEN A JURY'S WEIGHING OF AN INVALID AGGRAVATING CIRCUMSTANCE CONSTITUTES "HARMLESS ERROR"

The Tennessee Supreme Court's "harmless-error" analysis highlights a growing confusion concerning the proper standard for harmless-error review of an invalid aggravating circumstance. While Clemons v. Mississippi, 494 U.S. 738 (1990) held that a State appellate court may find a jury's erroneous consideration of an aggravting circumstance to be "harmless error," this Court and the lower courts have announced and applied divergent standards for assessing such harmlessness.

A. AFTER INVALIDATING A STATUTORY AGGRAVATING CIRCUMSTANCE, ABSENT REWEIGHING, A STATE APPELLATE COURT MUST APPLY CHAPMAN HARMLESS-ERROR ANALYSIS

This Court has made clear that a state court which conducts harmless error review of an unconstitutional aggravating circumstance must apply the "harmless error" standard set forth in Chapman v. California, 386 U.S. 18, 24 (1967). Richmond v. Lewis, 508 U.S. ___, ___, 113 S.Ct. 528, 535 (1993)(appellate court must apply "constitutional harmless error analysis"), quoting Stringer v. Black, 503 U.S. ___, ___, 112 S.Ct. 1130, 1137 (1992); Sochor v. Florida, 504 U.S. ___, 112 S.Ct. 2114 (1992); Clemons v. Mississippi, 494 U.S. at 753 (noting that Mississippi Supreme Court "applied the proper 'beyond a reasonable doubt' standard" of Chapman); Pensinger v. California, 502 U.S. ___, 112 S.Ct. 351 (1991)(O'Connor, Kennedy, JJ., dissenting from denial of certiorari); Feltrop v. Missouri, 501 U.S. 1262 (1991)(Marshall, J., dissenting from denial of certiorari).

Under the exact terms of the Chapman test, once constitutional error occurs, the burden

shifts to the State to prove "beyond a reasonable doubt that the error complained of did not contribute to the verdict obtained." Chapman, 386 U.S. at 24; quoted in Sullivan v. Louisiana, 508 U.S. ___, ___, 113 S.Ct. 2078, 2081 (1993); Yates v. Evatt, 500 U.S. 391, 403 (1991); Satterwhite v. Texas, 486 U.S. 249, 258-259 (1988), cited in Clemons, supra. In the context of an invalid aggravating circumstance, the State court must demonstrate that consideration of the invalid circumstance is "harmless beyond a reasonable doubt in that it did not contribute to the sentence obtained." Sochor v. Florida, 504 U.S. at ___, 112 S.Ct. at 2123 (internal quotations omitted).

As this Court has emphasized, this test only involves a determination whether the jury reached its verdict by relying, in any way, upon an invalid consideration:

> [T]he question [*Chapman*] instructs the reviewing court to consider is not what effect the constitutional error might generally be expected to have upon a reasonable jury, but rather what effect it had upon the . . . verdict in the case at hand. See *Chapman*,. . . 386 U.S., at 24 (analyzing effect of error on 'verdict obtained.'). Harmless-error review looks, we have said, to the basis on which 'the jury *actually rested* its verdict.' *Yates v. Evatt*, 500 U.S. ___, ___, 111 S.Ct. 1884, 1893 (1991)(emphasis added). The inquiry, in other words, is not whether, in a trial that occurred without the error, a guilty verdict would have been rendered, but whether the . . . verdict actually rendered in *this* trial was surely unattributable to the error.

Sullivan v. Louisiana, 508 U.S. at ___, 113 S.Ct. at 2081.

"[T]he issue under *Chapman* is whether the jury actually rested its verdict on" an unconstitutional aggravating factor, and that State must "show beyond a reasonable doubt that the [error] must have made no difference in reaching the verdict obtained." Yates, 500 U.S. at 404, 407. The State must demonstrate beyond a reasonable doubt that the error "did not influence the sentencing jury." Satterwhite, 486 U.S. at 260. See also Brecht v. Abrahamson, 507 U.S. ___, ___, 113 S.Ct. 1710, 1724 (1993)(Stevens, J., concurring)("[T]he question is not were they [the

compare Wilcher v. State, 635 So.2d 789, 791 (Miss. 1993)(following invalidation of aggravating circumstance, capital defendant has right to jury sentencing under Mississippi law).

In conducting its harmless-error analysis, the Tennessee Supreme Court did not consider the effect of the invalid felony-murder circumstance on the decision of *Terry Barber's jury* to impose death. Rather than considering the contribution of the invalid circumstance to the death sentence actually imposed, the Tennessee Supreme Court analyzed harmlessness by hypothetically excising the invalid circumstance and then determining whether there would have been sufficient evidence to sustain the verdict absent the error: "[W]e conclude, beyond a reasonable doubt, that the sentence would have been the same had the jury given no weight to the invalid felony murder aggravating factor." Barber, Appendix C, slip op. at 12.[9]

This is the exact type of analysis condemned in Sochor, Sullivan, Yates, and Chapman. By affirming the death sentence by holding that a death sentence *would* have been imposed "had the jury given no weight to" the invalid factor, the Tennessee Supreme Court has not answered the relevant Chapman inquiry: whether the jury relied upon the invalid factor in reaching its verdict. As this Court has made clear in Sullivan, Chapman does not look at what the jury might have done *without* the error; Chapman looks exclusively at what the jury did *with* the error. Here, the Tennessee Supreme Court did not properly apply the Chapman harmless-error standard. Compare Price v. North Carolina, 512 U.S. ___, 114 S.Ct. 2777 (1994)(Blackmun, J., concurring)(while remanding to North Carolina courts, noting that North Carolina Supreme Court did not properly conduct Chapman analysis and that certiorari on harmless-error issue would be

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[9] The Tennessee Supreme Court has made clear that it is conducting harmless-error analysis, and not reweighing.

warranted if relief not granted on remand).

Critically, had the Tennessee Supreme Court properly applied Chapman, it would have been obligated to reverse the death sentence, because the invalid felony-murder circumstance did indeed contribute to Terry Barber's death sentence. First, the jury was told to weigh aggravating factors, including the felony murder aggravating circumstance. T.R. 170, 172. Second, the jury was required to write in its verdict the aggravating circumstances found, and the jury specifically stated that it relied upon the felony-murder circumstance and weighed it in the sentencing calculus. T.R. 167. Third, the jury was instructed that, in imposing a death sentence, it could weigh *only* the aggravating circumstances which it found, nothing else. T.R. 172. See e.g., Cozzolino v. State, 584 S.W.2d 765 (Tenn. 1979)(jury may not weigh as aggravation any matters other than statutory aggravating circumstances). Thus, there is little doubt that the invalid circumstance contributed to the death verdict, the jury having placed it on death's side of the scale, along with only one other item: the "heinous, atrocious, or cruel" aggravating circumstance.

Accordingly, contrary to the dictates of Sochor, Sullivan, and Yates, the Tennessee Supreme Court erroneously affirmed Terry Barber's death sentence. The Tennessee Supreme Court's harmless-error analysis is flawed. See Smith v. United States, 502 U.S. ___, 112 S.Ct. 667 (1991)(Blackmun, O'Connor, Souter, JJ., dissenting from denial of certiorari)(Fourth Circuit's harmless error analysis erroneous because it gave "only cursory consideration to how the error contributed to the verdict," and merely considered the properly admitted evidence in a light most favorable to the government).

C. THERE IS GROWING CONFUSION CONCERNING THE PROPER STANDARD OF REVIEW

1. THIS COURT HAS ISSUED CONFLICTING PRONOUNCEMENTS CONCERNING THE PROPER STANDARD OF REVIEW IN BOTH STRINGER AND CLEMONS

There is growing confusion concerning the proper application of the Chapman standard, especially in capital cases. Carter, "Harmless Error In The Penalty Phase Of A Capital Case: A Doctrine Misunderstood And Misapplied," 28 Ga. L. Rev. 125, 134-136 (1993)(cited herafter as "Harmless Error")(noting differing interpretations of Chapman's "contribute to the verdict" standard).

Here, the Tennessee Supreme Court's failure to apply Chapman appears to derive from its interpretation of Stringer v. Black, supra. The Tennessee Supreme Court has cited Stringer to maintain that proper harmless-error analysis requires finding "beyond a reasonable doubt, that the sentence would have been the same had the sentencing authority given no weight to the invalid aggravating factor." Barber, Appendix C, slip op. at 6, citing Stringer, 503 U.S. at ___, 112 S.Ct. at 1137. This Stringer standard, however, is wholly inconsistent with the Stringer Court's previous restatement of the Chapman test: a court in a weighing State cannot "affirm a death sentence without a thorough analysis of the role an invalid aggravating factor played in the sentencing process." Stringer, 503 U.S. at ___, 112 S.Ct. at 1136. The Stringer passage cited by the Tennessee Supreme Court is at odds with this Court's clear pronouncements in Sullivan, Yates, Satterwhite, and Chapman itself. It appears that these contradictory statements in Stringer may have confused the lower court.

Other opinions of this Court have apparently added to the confusion. Most notably, Clemons v. Mississippi, supra, cites the Chapman test as the proper standard (494 U.S. at 753)

but then almost immediately cites a different standard, viz. whether "it was beyond reasonable doubt that the sentence would have been the same even if there had been no [improper] instruction at all." Id. See also McKenzie v. Montana, 449 U.S. 1050 (1980)(Marshall, J., dissenting)(when conducting harmless error, reviewing court may exclude tainted evidence and determine whether remaining evidence supports conviction). See also Carter, "Harmless Error," 28 Ga. L. Rev at 134-138 (noting this Court's differing applications of Chapman in non-capital cases).

2. THE LOWER COURTS ARE APPLYING DIVERGENT STANDARDS OF REVIEW, AND MANY ARE NOT STRICTLY APPLYING CHAPMAN

Given such pronouncements from this Court, the lower courts have been applying different harmless-error standards when reviewing death verdicts tainted by invalid aggravating circumstances. The Tenth Circuit has held that an error is "harmless" if the jury "would have imposed the same sentence even if the [trial] court had not submitted the invalid circumstance." Coleman v. Saffle, 869 F.2d 1377, 1390 (10th Cir. 1989), cert. denied 494 U.S. 1090 (1990). A divided Eleventh Circuit has approved the harmless error analysis of the Florida Supreme Court, which has held that the harmlessness of an invalid circumstance is shown simply if the sentencer "would have imposed the same sentence had it found that the aggravator had not been established." White v. Dugger, 972 F.2d 1218, 1227 (11th Cir. 1992). The Eighth Circuit has queried whether "the decision would have been the same even absent the invalid factor." Williams v. Clarke, ___ F.3d. ___, No. 93-2733 (8th Cir. Dec. 2, 1994). Each of these formulations of harmless-error analysis, however, is inconsistent with Sullivan, Yates, Satterwhite, and Chapman, because each of these standards does not assess how the jury viewed the erroneous

evidence and whether the jury itself relied upon the circumstance as a reason for imposing the death sentence.

On the other hand, other States and circuits have faithfully applied Chapman constitutional harmless-error analysis. Delaware, for instance, has applied the Chapman test to capital sentencing, holding that an error is harmless only if it "did not contribute to the death sentence[] obtained by the State." Dawson v. Delaware, 608 A.2d 1201, 1204 (Del. 1992). Nebraska also applies Chapman when evaluating the jury's consideration of invalid factors. Reeves v. State, 239 Neb. 419, 427 (1991), cert. denied 113 S.Ct. 114 (1992)(citing Chapman). The Ninth Circuit has likewise applied this standard. Wade v. Calderon, 29 F.3d 1312, 1322 (9th Cir. 1994), cert. pending sub nom. Calderon v. Wade, (U.S. No. 94-761)(consideration of invalid aggravating circumstance requires remand for resentencing where consideration of the circumstance "influenced the jury's verdict.")

Like Tennessee, however, other States which use harmless-error analysis have either misunderstood Chapman or failed to apply it. Rather than looking at the effect of the error upon the actual verdict, these States essentially determine whether, absent the invalid aggravating circumstance, the result of the proceeding would have been the same. Rather than looking at the actual effect of the error on the jury's deliberations, these courts look to the hypothetical effect that such error would have had on the outcome of deliberations.

Alabama, Florida, Illinois, Mississippi, and Utah have employed this type of analysis. Lawhorn v. State, 581 So.2d 1159, 1176 (Ala. Cr. App. 1990), aff'd 581 So.2d 1179 (Ala. 1991), cert. denied 112 S.Ct. 445 (1991); Schere v. Florida, 579 So.2d 86, 96 (Fla. 1991)(Florida Supreme Court will find harmlessness if it believes that the trial "court would have imposed the

> impermissible weight to the unconstitutional aggravator the jury was instructed to consider.

Colorado v. Rodriguez, 794 P.2d at 1005 (Kirschbaum, J., dissenting).

D. THIS COURT SHOULD GRANT THE PETITION TO RESOLVE THE GROWING CONFLICT OVER THE PROPER STANDARD OF REVIEW

Sochor, Sullivan, Yates, and Chapman provide the proper harmless-error standard for analyzing the effect of an invalid aggravating circumstance on a jury's death verdict. Stringer and Clemons appear to provide a contradictory standard. Some of the lower courts apply Chapman faithfully. Others, like the Tennessee Supreme Court, apply different standards and affirm death sentences when such sentences should properly be reversed.

Consequently, the lower courts are affirming and reversing death sentences based upon conflicting standards of harmless error. Given this ongoing conflict, the importance of this issue to the jurisprudence of capital sentencing, and the fact that this Court demands that harmless error analysis be properly conducted initially by the State courts, See Brecht v. Abrahamson, 507 U.S. ___, 113 S.Ct. 1710 (1993), this Court should grant the petition for certiorari and reverse the judgment of the Tennessee Supreme Court. See Price v. North Carolina, 512 U.S. ___, 114 S.Ct. 2777 (1994)(Blackmun, J., concurring)(noting misapplication of harmless-error standard); Norris v. Starr, U.S.No. 94-470, cert. denied ___ U.S. ___ (Nov. 8, 1994)(denying certiorari where lower court held that error in capital sentencing not harmless under Chapman).

In the alternative, this Court should hold the petition pending the disposition of two related cases now pending before this Court: O'Neal v. McAninich, U.S. No. 93-7407, cert. granted, 114 S.Ct. 1396 (April 4, 1994)(addressing conflict concerning harmless-error standard of review in federal habeas); Calderon v. Wade, U.S. No. 94-761 (pet. for cert. filed Oct. 26,

1994)(seeking review of judgment finding that jury's consideration of invalid aggravating factor was not harmless).

II. A JURY MAY NOT IMPOSE A DEATH SENTENCE BASED ON A FINDING THAT A MURDER IS "HEINOUS, ATROCIOUS, OR CRUEL IN THAT IT INVOLVED TORTURE OR DEPRAVITY OF MIND"

Terry Barber was sentenced to death based upon a bare finding that the offense was "heinous, atrocious, or cruel in that it involved torture or depravity of mind." T.R. 167. This aggravating circumstance was unconstitutional under the Eighth and Fourteenth Amendments.

When considering the constitutional validity of a finding that a murder was "heinous," "there is no serious argument that this factor is not facially vague." Richmond v. Lewis, 506 U.S. ___, ___, 113 S.Ct. 528, 534 (1993). This Court has repeatedly and unanimously held that the term "heinous," when used as an aggravating factor, is unconstitutionally vague on its face. Richmond, 506 U.S. at ___, 113 S.Ct. at 534; Shell v. Mississippi, 498 U.S. 1 (1990)(per curiam); Clemons v. Mississippi, 494 U.S. 738 (1990)(assuming vagueness of heinous" aggravating circumstance); Maynard v. Cartwright, 486 U.S. 356, 364 (1988). It is of no constitutional significance that Barber's jury found that the offense was "especially" heinous, because the term "especially," as found by the jury, does not cure the inherent vagueness of the term "heinous":

> The . . . contention that the addition of the word 'especially' somehow guides the jury's discretion, even if the term 'heinous' does not, is untenable. To say that something is 'especially heinous' merely suggests that the individual jurors should determine that the murder is more than just 'heinous,' whatever that means, and an ordinary person could honestly believe that every unjustified, intentional taking of human life is 'especially heinous.'

Maynard, 486 U.S. at 364, citing Godfrey v. Georgia, 446 U.S. 420, 428-429 (1980).

Barber's jury was also instructed that "heinous" meant "grossly wicked or reprehensible;

abominable; odious; vile," T.R. 169, but these definitions were equally vague, and unconstitutional. "[V]ague terms do not suddenly become clear when they are defined by reference to other vague terms." Adamson v. Ricketts, 865 F.2d 1011, 1032 (9th Cir. 1988)(en banc), cert. denied 497 U.S. 1031 (1990). Here, each of these additional terms was itself unconstitutionally vague. Godfrey v. Georgia, 446 U.S. at 428 ("outrageously or wantonly vile, horrible and inhuman" aggravating circumstance is unconstitutionally vague); Shell v. Mississippi, 498 U.S. 1 (terms "outrageously wicked and vile" unconstitutionally vague); See also Cartwright v. Maynard, 822 F.2d 1477 (10th Cir. 1987)(en banc), aff'd, 486 U.S. 356 (1988).

Likewise, there is no dispute that the alternative terms "atrocious" and "cruel" are unconstitutionally vague, even as further defined in the jury instructions. Shell, supra; Maynard v. Cartwright, supra ("cruel" unconstitutionally vague even when defined as "pitiless, or designed to inflict a high degree of pain, utter indifference to, or enjoyment of, the suffering of others."); See T.R. 169.

In addition, the terms "torture" and "depravity of mind" -- at least one of which was required for a finding of the aggravating circumstance (T.R. 170) -- were themselves unconstitutionally vague. Just as the modifying word "especially" does not cure the vagueness of the terms "heinous, atrocious, or cruel" neither does a jury's qualification that the "heinous, atrocious, or cruel" murder involves "torture" or "depravity of mind."

The phrase "depravity of mind" is unconstitutionally vague. This Court has recognized that "depravity of mind" is vague, because a murder involving "depravity of mind" is no different from any other murder: "It is, of course, arguable that any murder involves depravity of mind . . . ." Godfrey, 446 U.S. at 423, quoting Gregg v. Georgia, 428 U.S. 153, 201 (1976). This Court

has thus held that the term "depraved" is unconstitutionally vague. Walton v. Arizona, 497 U.S. 639, 654 (1990)("especially heinous, cruel, or depraved"). The Eighth and Ninth Circuits have also found "depravity of mind" to be unconstitutionally vague. Newlon v. Armontrout, 885 F.2d 1328 (8th Cir. 1989), cert. denied 497 U.S. 1038 (1990); Deutscher v. Whitley, 884 F.2d 1152 (9th Cir. 1989).[10] As the Eighth Circuit explained in Newlon:

> Absent a clear, limiting directive, the words 'depravity of mind' . . . are not capable of objective determination. As in Godfrey, 'nothing in these few words, standing alone, . . . implies any inherent restraint on the arbitrary and capricious infliction of the death sentence.'

Newlon, 885 F.2d at 1334. As the Ninth Circuit has stated: "There is nothing in the definition of depravity of mind that restrains arbitrary imposition of the death penalty. See Godfrey, 446 U.S. at 428." Deutscher v. Whitley, 884 F.2d at 1162.

Similarly, the term "torture" does not meaningfully restrain the arbitrary imposition of the death penalty. A reasonable juror could honestly believe that every murder involves "torture," because the term "could be used by 'a person of ordinary sensibility to fairly characterize almost every murder," Shell, 498 U.S. at 3 (Marshall, J, concurring): Every murder is reasonably understood to involve "great physical or mental pain" or "pain or anguish," as the term torture was defined in this case. T.R. 169-170. Every murder necessarily involves enough physical trauma to induce death, with its accompanying mental trauma. Because no person can be killed instantaneously, every murder necessarily involves "torture." See Wade v. Calderon, 29 F.3d 1312, 1319 (9th Cir. 1994), cert. pending sub nom. Calderon v. Wade, (U.S. No. 94-761)

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[10] Vacated on other grounds, 500 U.S. 901 (1991), reinstated on remand 946 F.2d 1443 (9th Cir. 1991), vacated on other grounds, 113 S.Ct. 367 (9th Cir. 1992), reinstated on remand and habeas corpus relief granted, 16 F.3d 981 (9th Cir. 1994).

(certiorari petition challenging invalidation of "torture" special circumstance in capital sentencing).

Because the jury instructions and jury findings were phrased in the disjunctive, federal relief is warranted if any of the alternative findings was, in fact, vague. See Shell v. Mississippi, 498 U.S. at 2 (Marshall, J., concurring)(where aggravating circumstance phrase in alternative, unconstitutionality of any alternative finding invalidates death sentence); Zant v. Stephens, 462 U.S. 862, 881 (1982)(when verdict based upon alternate findings, one of which is unconstitutional, verdict cannot be upheld); Stromberg v. California, 283 U.S. 359 (1931). Because each of the terms -- "heinous," "atrocious," "cruel," and "torture" or "depravity of mind" -- is unconstitutional, federal relief is warranted.

Accordingly, because the terms "heinous," "atrocious," "cruel," "torture" and "depravity of mind" are individually vague and fail to narrow the class of persons eligible for the death penalty, Terry Barber's death sentence is unconstitutional and should be vacated. Shell v. Mississippi, supra. In a weighing State, where an uninstructed jury weighs a vague aggravating circumstance, the death sentence is *ipso facto* unconstitutional, and only constitutional harmless-error analysis or appellate reweighing can permit execution of the sentence. Shell, supra; Wiley v. Puckett, 969 F.2d 86 (5th Cir. 1992); Compare Walton v. Arizona, 497 U.S. 639 (1990)(where trial judge is final sentencer, existence of narrowing construction precludes finding of constitutional error in imposition of sentence).

This Court should therefore grant the writ of certiorari. In the alternative, the petition should be held pending resolution of the pending certiorari petition in Calderon v. Wade, U.S. No. 94-761 (cert. filed Oct. 26, 1994)(seeking review of judgment granting federal relief where

jury predicated death sentence on "torture" special circumstance).

CONCLUSION AND PRAYER FOR RELIEF

WHEREFORE, for the reasons stated, this Honorable Court should grant the petition for writ of certiorari and reverse the judgments of the Tennessee Supreme Court and Court of Criminal Appeals, and vacated Petitioner's death sentence. In the alternative, this Court should hold the petition pending the disposition of O'Neal v. McAninich, U.S. No. 93-7407, cert. granted, 114 S.Ct. 1396 (April 4, 1994), and/or Calderon v. Wade, U.S. No. 94-761 (pet. for cert. filed Oct. 26, 1994). See also Cazes v. Tennessee, U.S. No. 94-6270 (pet. for cert. filed July 5, 1994)(seeking resolution of lower court conflict in capital sentencing between application of Chapman harmless-error analysis and other forms of harmless-error analysis).

Respectfully Submitted,

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• Counsel of Record

APPENDIX A

PUBLISHER'S NOTE:

ORIGINAL PAGINATION IS NOT CONTINUOUS.

FILED
MAY 13 1992
JEWEL REDDEN, CLERK

IN THE COURT OF CRIMINAL APPEALS OF TENNESSEE

AT JACKSON

FEBRUARY 1991 SESSION

TERRY D. BARBER,	)	
	)	C.C.A. NO. 2
Appellant,	)	
	)	LAKE COUNTY
VS.	)	
	)	HON. JOE G. RILEY,
STATE OF TENNESSEE,	)	JUDGE
	)	
Appellee.	)	(Post-Conviction)

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OPINION FILED: MAY 13 1992

AFFIRMED

JOHN H. PEAY,
Judge

In the petitioner's first issue he contends that the mandatory language in T.C.A. § 39-2-203(g) (1982) violates Article I, § 19 of the Tennessee Constitution. T.C.A. § 39-2-203(g) provided that:

> [i]f the jury unanimously determines that at least one statutory aggravating circumstance or several statutory aggravating circumstances have been proved by the state beyond a reasonable doubt, and said circumstance or circumstances are not outweighed by any mitigating circumstances, the sentence shall be death. (emphasis added)

While it is arguable that the petitioner waived this issue by failing to raise it on direct appeal, See T.C.A. §§ 40-30-111, -112(a), the Tennessee Supreme Court rejected this precise claim in State v. Black, 815 S.W.2d 166, 185-87 (Tenn. 1991). This issue is, therefore, without merit.

The petitioner's second issue again makes reference to the provision in Article I, § 19 of the Tennessee Constitution. However, he joins this section with the prohibition against cruel and unusual punishment found in Article I, § 16, contending that T.C.A. § 39-2-203(g) (1982) violates Article I, § 16 because jury discretion is excessively limited. This issue has been previously decided adversely to the petitioner and is, therefore, without merit. See T.C.A. §§ 40-30-111, -112(a).

While the petitioner's framing of the issue was somewhat different on direct appeal, the Tennessee Supreme Court held that T.C.A. § 39-2-203(f) and (g) clearly state the correct analysis in arriving at a death sentence "and that [t]he sentencing procedure under the death penalty

statute is constitutional". Barber, 753 S.W.2d 659, 669. Such determination was reinforced by Black, 815 S.W.2d 166, 185-87 (Tenn. 1988).

The petitioner's third issue is likewise without merit as he contends that execution as a means of punishment is unconstitutional since it "may involve the conscious infliction of physical pain". This argument was specifically addressed and rejected by our Supreme Court on direct appeal. Barber, 753 S.W.2d 659, 670.[2] As such, it has been previously determined and is not a proper issue in this post-conviction appeal. See T.C.A. § 40-30-111, -112(a).

In his fourth issue the petitioner contends that the death penalty is unconstitutional because the election of when to pursue this punishment often entails the abuse of prosecutorial discretion. As was true of the petitioner's first issue, this contention could have been raised previously. While it is arguable that the issue has, therefore, been waived, we have considered the matter and find it to be without merit.

The petitioner in a post-conviction action has the burden of proving his or her allegations by a preponderance of the evidence. Turner v. State, 698 S.W.2d 90, 91 (Tenn. Crim. App. 1985). The petitioner in this case has clearly

[2]We would further note that more recently the Supreme Court deferred to the legislature and refused to preclude the use of electrocution as the means of inflicting the death penalty in this state. Black, 815 S.W.2d 166, (Tenn. 1991).

that "[t]he murder was committed for the purpose of avoiding, interfering with, or preventing a lawful arrest or prosecution of the defendant or another". The petitioner fails to cite any authority for the proposition that the need for additional proof is a requirement for finding an aggravating circumstance to be valid for consideration in a capital case. Neither do we find such authority. But see Lowenfield v. Phelps, 484 U.S. 231, 108 S.Ct. 546, 552-55, 98 L.Ed.2d 568 (1988). As with all of the aggravating circumstances, T.C.A. § 39-2-203(i)(6) provides but one factor for the sentencing body to consider, and the record does not even indicate that this factor was charged and/or argued to the jury. For these reasons we conclude that the defendant has failed to meet his burden; thus, this allegation is without merit.

Finally, the petitioner raises the same type of claim with reference to felony murder. He claims that "a defendant could be convicted of felony murder. . .and then be sentenced to death pursuant to the 'felony murder' aggravating circumstance [T.C.A. § 39-2-203(i)(7) (1982)] without proof of any additional fact beyond that necessary to convict of felony murder". The State correctly cites Lowenfield, 484 U.S. 231, 108 S.Ct. 546, 552-55, 98 L.Ed.2d 568 for the proposition that the imposition of the death penalty may be upheld when the single aggravating circumstance found was also an element of the offense.[4] Furthermore, this particular

[4]The element in Lowenfield was the intent "to kill or inflict great bodily harm upon more than one person" while the aggravating circumstance was "knowingly creat[ing] a risk of death or great bodily harm to more than one person". Lowenfield, 484 U.S. 231, 108 S.Ct. 546, 554, 98 L.Ed.2d 568.

petitioner's trial counsel. The petitioner is entitled to no relief based upon this issue.

In the petitioner's seventh issue he alleges that the failure to inform a jury of the consequences of failing to reach a unanimous verdict in the sentencing phase of a capital case violates a principle of federal constitutional law. This issue was previously determined by our Supreme Court in the petitioner's direct appeal: the Court reiterated its previous holdings "that it is constitutional. . .not to inform the jury that if they fail to agree unanimously on a punishment, the trial court will impose a life sentence". Barber, 753 S.W.2d 659, 670-71. Thus, this contention provides no basis for a reversal.

In his eighth issue the petitioner raises his first of many claims concerning the alleged ineffectiveness of his trial counsel. Specifically, he contends that his trial attorneys were ineffective because they failed to "adequately investigate mitigating evidence" or to present such at his sentencing hearing. In bringing this claim he makes numerous references to prior head injuries, possible "hereditary problems and congenital disorders within [his] family", and emotionally traumatic experiences from his childhood. In addition, the petitioner claims that counsel should have obtained an expert to evaluate him with these factors in mind.

When reviewing a Sixth Amendment claim of ineffective assistance of counsel, this Court must determine whether the advice given or services rendered by the attorney are

within the range of competence demanded of attorneys in criminal cases. Baxter v. Rose, 523 S.W.2d 930, 936 (Tenn. 1975). In order to prevail on a claim of ineffective counsel, a petitioner "must show that counsel's representation fell below an objective standard of reasonableness" and that this performance prejudiced the defense. There must be a reasonable probability that but for counsel's error the result of the proceeding would have been different. Strickland v. Washington, 466 U.S. 668, 687-88, 692, 694, 104 S.Ct. 2052, 2064, 2067-68, 80 L.Ed.2d 674 (1984); Best v. State, 708 S.W.2d 421, 422 (Tenn. Crim. App. 1985). Furthermore, as we are dealing with an issue raised through a post-conviction petitioner, the factual findings of the trial court "are conclusive on appeal unless the evidence preponderates against the judgment". State v. Buford, 666 S.W.2d 473, 475 (Tenn. Crim. App. 1983).

The trial judge in this case found that the petitioner's trial counsel had never been advised of the petitioner's head injuries or of the alleged hereditary problems in the petitioner's family. John Vaughn, one of the petitioner's trial attorneys, testified consistently, adding that to the best of his recollection, he and cocounsel had visited the petitioner's mother "on several occasions and talked to her in preparation for the trial and went over [the petitioner's] background. . . .we were begging for information on his background. And these head injuries, believe me, we would have done something had we known about them". With regard to the petitioner's alleged hyperactivity and nervous tic, the trial judge found that the existence of these conditions would not have helped the petitioner's case. He

also noted that the prior drug use might have actually harmed the petitioner's case and that the decision not to introduce this evidence was a tactical one. He then concluded that trial counsel had offered other types of background information and pleas for life from both the petitioner and his mother.

Finally, with reference to the failure to employ an expert to make a psychological evaluation of the petitioner, we again find that the trial court ruled correctly. While the technical record contains an affidavit from a psychologist, the assertions therein concerning the petitioner are highly speculative and based on second-hand information. Without more substantial proof the petitioner has clearly failed to satisfy the second prong of the Strickland test, regarding prejudice. Prior to trial, counsel had succeeded in their motion for a thirty day evaluation; however, the petitioner, by his own admission, did not want one. According to his testimony, he believes that his counsel wanted him "to go ahead and have it" but that he "didn't want to delay". His desire to forego this evaluation was made part of the record in open court at that time. For these reasons, we believe that this portion of the petitioner's issue also lacks merit.[5]

In his ninth issue the petitioner alleges that "any

[5] As his argument focused exclusively on the need for psychological evaluation, the petitioner apparently elected not to pursue his allegation concerning counsel's failure to secure a "mitigating specialist".

limitation of the jury's individualized consideration of mitigating factors" results in a violation of the Eighth and Fourteenth Amendments to the United States Constitution and Article I, §§ 8 and 16 of the Tennessee Constitution. Through this issue he reiterates his challenge of trial attorneys' ineffectiveness for failing to thoroughly investigate his background for mitigating evidence and adds that counsel should have made mention of an alleged situation in which his jail door had been left open all night but he had made no attempt to escape. The petitioner's counsel makes no reference to where proof of the unlocked jail door incident may be found in the record, and we do not recall any such proof from our review. This portion of the argument is, therefore, waived. See T.R.A.P. 27(a)(7) and (g); Rules of the Court of Criminal Appeals of Tennessee 10(b); State v. Killebrew, 760 S.W.2d 228, 231, 233-35 (Tenn. Crim. App. 1988). We are, therefore, left with basically the same allegation of ineffective assistance as was raised in his prior issue which we found to lack merit. We have not altered our opinion.

Also within this issue the petitioner asserts that "the trial judge erred at post-conviction by flatly denying the medical and social history of the [petitioner] had any relevance as to mitigation". The trial judge concluded that from the evidence before him that he did not believe that there was any proof that the petitioner's medical and social history would have been beneficial. We do not find that the evidence preponderates against this conclusion; therefore, this issue is without merit.

In his tenth issue the petitioner contends that the giving of the Tennessee Pattern Jury Instructions' "absolute charge on the question of sympathy" at his sentencing hearing violated his constitutional rights. Once again, it may be argued that this issue was waived by failure to raise it previously. However, the trial judge noted in his order denying relief that no such charge had been given at the sentencing phase. Our review reveals that the trial judge was correct, and we must conclude that counsel for the petitioner apparently did not consult the record before or after the post-conviction hearing. This issue is entirely without merit.

While not framed as such, the petitioner's eleventh issue raises another basis on which to conclude that he received ineffective assistance of counsel. In this issue he contends that counsel should have briefed and objected to the "Tennessee murder statute and Pattern Jury Instructions" as they unconstitutionally shifted the burden to the defense to prove that the homicide was not malicious. However, the petitioner was convicted of murder in perpetration of larceny, i.e., felony murder. As there is no requirement that malice must be proven in order to find a defendant guilty of felony murder, the petitioner has not been harmed or prejudiced in any way. Without proof of prejudice, there is no ineffective assistance of counsel. See Strickland, 466 U.S. 668, 692, 104 S.Ct. 2052, 2067, 80 L.Ed.2d 674.

In his twelfth issue the petitioner sets out his contention as follows: "The State violated Caldwell v. Mississippi, 472 U.S. 320, 105 S.Ct. 2633, 86 L.Ed.2d 231

(1985) in its closing arguments, and defense counsel failed to object to these violations during closing argument, thus creating a constitutionally (sic) Sixth Amendment problem for [petitioner] as it violated his right to effective assistance of counsel". He then correctly states that Caldwell stands for the proposition that a prosecutor arguing in a death penalty case may not attempt to diminish the jurors' perception of their role and sense of responsibility by remarking that their decision is reviewable by an appellate court.

However, Caldwell is in no way applicable to the contested statements and actions of the prosecutor in this matter. Through his brief the petitioner instead makes reference to the assistant district attorney's "cr[ying] to the jury with [b]iblical connotations". Because his issue as stated is not supported by his argument or references to the record, it is deemed waived.[6] Rules of the Court of Criminal Appeals of Tennessee 10(b).

Furthermore, the issue raised by his argument is without merit. Prior to making his portion of the closing argument during the guilt phase of the trial, the assistant district attorney in question was told by the trial judge to refrain from making biblical quotes. This assistant said that he did not intend to do so. He then began, and approximately ten sentences into his argument, he said that the victim had "had her day in judgment, but not in man's court

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[6]We would, however, add that our review of the record revealed no Caldwell violation; thus, this issue would have been without merit.

because of the hands of some other person". Being cautious, the trial judge interrupted and asked counsel to approach the bench. The judge then issued the following warning to the assistant:

> Okay. I'm going to have to take it on my own. You've got one more shot at it. If you can make your final argument without crying, that's fine. If you cannot, do not make it. I'm going to tell you now, it is a highly emotional case. You're seeking the death penalty and we're not going to have crying in the final argument. And we're not going to be talking about days in judgment and making [b]iblical references in final argument now. . . .

The petitioner points to no further comments of this nature, and our review of the record revealed no others. While quoting from the Bible is prohibited, the assistant did not do so. See State v. Harrington, 627 S.W.2d 345, 350 (Tenn. 1981), cert. denied, 457 U.S. 1110, 102 S.Ct. 2913, 73 L.Ed.2d 1320 (1982). He was potentially on the threshold of an excessively emotional argument. However, following this admonishment by the trial court, the record reveals no further crying or arguable biblical references.

In denying this post-conviction petition, the trial court found that "[e]motions were high and defense counsel made a very strong argument during the guilt phase as well as an extremely emotional argument during the penalty phase. The [S]tate responded with strong arguments." In view of all of these factors, we do not believe the assistant's actions rise to the level of prosecutorial misconduct. Even if the actions were deemed to constitute error, such was harmless. See State v. Buck, 670 S.W.2d 600, 609 (Tenn. 1984).

Tennessee Supreme Court has already conducted a proportionality review and found that the sentence should stand; however, he believes that the review was flawed by the Court's failure to consider that his felony murder conviction was based upon larceny, a nonviolent offense. We find no merit to this argument.

The statute governing our Supreme Court's review of a death penalty sentence requires the Court to determine if: the sentence was arbitrarily imposed; the evidence supports the statutory aggravating circumstance or circumstances found; the evidence supports the finding that any mitigating circumstances were outweighed by the aggravating circumstance or circumstances; and the sentence "is excessive or disproportionate to the penalty imposed in similar cases, considering both the nature of the crime and the defendant". T.C.A. §§ 39-13-206(c) [formerly T.C.A. § 39-2-205(c) (repealed 1989).]. While larceny is a nonviolent offense, beating an elderly woman to death with a wrench certainly involves violence. In setting forth its finding that the imposition of the death penalty in this case was neither excessive or disproportionate, the Court cited numerous cases which were factually similar. The statute does not require the underlying felony in the comparative cases be the same: it requires factual similarity. As such was present, we have no reason to doubt the Court's finding.

After reviewing each of the above issues, we do not find the evidence preponderates against the trial judge's dismissal of the petition. See Buford, 666 S.W.2d 473, 475. We, therefore, affirm the judgment of the lower court. The

petitioner's sentence of death by electrocution is set for July 24, 1992, unless otherwise stayed by appropriate authority.

JOHN H. PEAY, Judge

CONCUR:

JOE B. JONES, Judge

JOSEPH M. TIPTON, Judge

FILED
OCT 03 1994
APPELLATE COURT CLERK
JACKSON

IN THE SUPREME COURT OF TENNESSEE

AT JACKSON

TERRY D. BARBER,

Appellant,

V.

STATE OF TENNESSEE,

Appellee.

FOR PUBLICATION

Filed October 3, 1994

LAKE CRIMINAL

Hon. Joe G. Riley, Judge.

No. 02S01-9212-CC-00086

(Post-Conviction)

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O P I N I O N

AFFIRMED.

DROWOTA, J.

APPENDIX B

3RD CASE of Level 1 printed in FULL format.

TERRY D. BARBER, Appellant, v. STATE OF TENNESSEE, Appellee.

BARBER v. STATE

[NO NUMBER IN ORIGINAL]

SUPREME COURT OF TENNESSEE, AT JACKSON

1992 Tenn. LEXIS 726

December 28, 1992, Decided

PRIOR HISTORY: [*1]

Criminal Court. Lake County. C.C.A. No. 2

OPINIONBY: PER CURIAM

OPINION: ORDER

On June 11, 1992, the Defendant-Appellant, Terry D. Barber, filed a Rule 11 Application for Permission to Appeal. The State filed its answer on June 30, 1992. On September 8, 1992, this Court filed its opinion in State v. Middlebrooks. A majority of this Court in Middlebrooks held that the death penalty may constitutionally be imposed upon conviction under the felony-murder statute, Tenn. Code Ann. @ 39-2-202(a) (1982). A majority also held that "When the defendant is convicted of first-degree murder solely on the basis of felony murder, the aggravating circumstances set out in Tenn. Code Ann. @@ 39-2-203(i)(7)(1982) and 39-13-204(i)(7)(1991), does not narrow the class of death-eligible murderers sufficiently under the Eighth Amendment to the U.S. Constitution and Article I, @ 16 of the Tennessee Constitution, because it duplicates the elements of the offense. As a result, we conclude that Tenn. Code Ann. @ 39-2-203(i)(7) is unconstitutionally applied under the Eighth Amendment to the U.S. Constitution and Article I, @ 16 of the Tennessee Constitution where the death penalty is imposed for felony murder."

Because [*2] the jury in Middlebrooks found two aggravating circumstances supported by the evidence beyond a reasonable doubt, it was necessary for the case to be remanded for re-sentencing. Even though the evidence amply supported one of the aggravating circumstances, we were unable to conclude that the elimination of the aggravating circumstances (i)(7) was harmless error beyond a reasonable doubt. The case was, therefore, remanded for re-sentencing.

Based upon our opinion in Middlebrooks, we grant review of this case for the limited purpose of considering whether the application of the felony murder aggravating circumstance (i)(7) in this case should be considered harmless error and the conviction and sentence of death affirmed, or whether this case, as in Middlebrooks, should be remanded for re-sentencing.

In order to expedite this appeal, the parties shall file within forty-five (45) days simultaneous briefs on the issue of "harmless error" as discussed in Middlebrooks. This cause shall be heard at the April term of court in Jackson, 1993.

This the 28th day of December, 1992.

PER CURIAM

APPENDIX C

In 1986, the Lake County Criminal Court convicted Terry Barber of first degree burglary, robbery by use of a deadly weapon, and first degree murder in perpetration of larceny. He was sentenced to fifteen years on the burglary, to life on the robbery by use of a deadly weapon, and to death on the murder in perpetration of larceny. The death penalty was predicated on the jury's finding of two aggravating circumstances: (1) the murder was especially heinous, atrocious or cruel in that it involved torture or depravity of mind, and (2) the murder was committed while the defendant was engaged in committing larceny. T.C.A. § 39-2-203(i)(5) and (7)(1982). This Court affirmed the conviction and sentence on direct appeal in State v. Barber, 753 S.W.2d 659 (Tenn. 1988), cert. denied, 488 U. S. 900, 109 S.Ct. 248, 102 L. Ed.2d 236 (1988).

Barber then filed a pro se post-conviction petition. He was subsequently appointed counsel, and his amended post-conviction petition raised fifteen issues. The trial court denied relief and the Court of Criminal Appeals affirmed. An application for permission to appeal pursuant to Rule 11, T.R.A.P., was filed in this Court.

While the application was pending, State v. Middlebrooks, 840 S.W.2d 317 (Tenn. 1992)(Justices Drowota and O'Brien dissenting), was released. In that case a majority of this Court held that "when the defendant is convicted of first-degree murder solely on the basis of felony murder the aggravating circumstance set out in Tenn. Code Ann. §§39-2-203(i)(7)(1982) and 39-13-204(i)(7)(1991)[the so-called felony murder circumstance], does not narrow the class of death-

eligible murderers sufficiently under the Eighth Amendment to the U.S. Constitution, and Article I, §16 of the Tennessee Constitution because it duplicates the elements of the offense." Id. at 346. As a result, the majority concluded "that Tenn. Code Ann. §39-2-203(i)(7) is unconstitutionally applied under the Eighth Amendment to the U.S Constitution and Article I, §16 of the Tennessee Constitution where the death penalty is imposed for felony murder." Id. See also State v. Bigbee, ___ S.W.2d ___ (Tenn. 1994)(Justices Drowota and O'Brien dissenting), which reaffirms Middlebrooks.

Because the decision in Middlebrooks called into question the constitutional validity of the sentence in this cause, we filed an order granting review for the limited purpose of considering two issues left open in Middlebrooks: (I) whether this Court's holding in that case should be retroactively applied; and (II), if so, whether application of the felony murder aggravating circumstance in this case constitutes harmless error.[1]

I.

The State first argues that this Court's decision in Middlebrooks should not be retroactively applied to a case

[1] The release of this opinion was delayed pending the disposition of two other capital cases, State v. Howell, 868 S.W.2d 238 (Tenn. 1993), and State v. Bigbee, ___S.W.2d ___(1994)(Justices Drowota and O'Brien dissenting). In Bigbee, filed contemporaneously with this opinion, the Court, as presently constituted, reconsidered and reaffirmed Middlebrooks. Those cases provide guidance for the determination of the issues before us today.

where the conviction became final long before the rule in Middlebrooks was announced. In State v. Meadows, 849 S.W.2d 748 (Tenn. 1993), authored by Justice Anderson, we departed from federal law on retroactivity and held that "a new state constitutional rule is to be retroactively applied to a claim for post-conviction relief if the new rule materially enhances the integrity and reliability of the fact finding process of the trial." Id. at 755. We now hold that the rule in Middlebrooks materially enhances both the integrity and the reliability of the fact finding process in the sentencing phase of a capital trial and should therefore be applied retroactively.

The constitutional concern in Middlebrooks was that the class of death-eligible murderers be narrowed so that only the worst offenders receive the death penalty. See Middlebrooks, 840 S.W.2d at 341-347. The Court observed that the felony murder aggravating circumstance duplicates the crime of felony murder and thereby makes all felony murderers susceptible to the death penalty. This Court found that such a result violates the Eighth Amendment to the United States Constitution, as well as Article I, Section 16 of the Tennessee Constitution. Id. at 346. When an aggravating circumstance is improperly injected into the process by which the jurors must weigh aggravating and mitigating circumstances to determine a sentence, the integrity and reliability of the sentencing process is jeopardized because the death penalty may not be reserved for only the most culpable defendants. For this reason, we apply Middlebrooks retroactively under the Meadows rule.

II.

The State next argues that the application of the felony murder aggravating circumstance in T.C.A. §39-2-203(i)(7) constituted harmless error. The State correctly points out that this Court has previously conducted a harmless error analysis and upheld the imposition of the death penalty where an aggravating circumstance was invalidated. See State v. Bobo, 727 S.W.2d 945, 956 (Tenn. 1987), cert. denied, 484 U.S. 872 (1987); State v. Workman, 667 S.W.2d 44, 49 (Tenn. 1984), cert. denied, 469 U.S. 837 (1984); State v. Cone, 665 S.W.2d 87, 94 (Tenn. 1984), cert. denied, 467 U.S. 1210 (1984); and State v. Campbell, 644 S.W.2d 281, 284 (Tenn. 1984), cert. denied, 469 U.S. 1920 (1984). But see State v. Van Tran, 864 S.W.2d 465, 480 (Tenn. 1993); State v. Terry, 813 S.W.2d 420, 425 (Tenn. 1991); and Teague v. State, 772 S.W.2d 915, 931 (Tenn. Cr. App. 1988). See also State v. Williams, 690 S.W.2d 517 (Tenn. 1985); State v. Pritchett, 621 S.W.2d 127 (Tenn. 1981); and State v. Moore, 614 S.W.2d 348 (Tenn. 1981).

At the time that we granted the application for permission to appeal in this case, it was unclear whether the use of an invalid aggravating circumstance under State v. Middlebrooks could likewise be harmless error. In Middlebrooks itself, the majority held only that, despite the ample evidence to support the one remaining aggravating circumstance, it was "unable to conclude that the elimination of the aggravating circumstance (i)(7) is harmless error beyond a reasonable doubt." 840 S.W.2d at 347. The case was therefore remanded for re-sentencing. Several subsequent cases were equally ambiguous on this issue.

> In order to guarantee the precision that individualized sentencing considerations demand and provide a principled explanation for our conclusion in each case, it is important, when conducting harmless error review, to completely examine the record for the presence of factors which potentially influence the sentence ultimately imposed. These include, but are not limited to, the number and strength of remaining valid aggravating circumstances, the prosecutor's argument at sentencing, the evidence admitted to establish the invalid aggravator, and the nature, quality and strength of mitigating evidence.

868 S.W.2d at 260-261.

In Howell, the sole remaining aggravating circumstance consisted of previous convictions of felonies involving the use of violence to the person. The evidence supporting this remaining aggravating factor was undisputed and overwhelming. The prosecutor's argument strongly emphasized the defendant's violent felony convictions, with little emphasis on the armed robbery. No additional evidence, nor any evidence that was not already properly before the jury, was introduced in support of the invalid aggravating circumstance. After a review of that record, we concluded beyond a reasonable doubt that the sentence would have been the same had the jury given no weight to the invalid felony murder aggravating factor, and we affirmed the sentence of death. 868 S.W.2d at 262.

This Court has since used the Howell harmless error analysis in State v. Sylvester Smith, ___ S.W.2d ___ (Tenn. 1994)(released contemporaneously with this opinion); State v. Nichols, ___ S.W.2d ___ (1994); State v. Cazes, 875 S.W.2d 253, 269-70 (Tenn. 1994) and State v. Oscar Smith, 868 S.W.2d

561, 584 (Tenn. 1993) (Howell harmless error treated in concurring opinion by Reid, C.J.). We must now apply the Howell analysis to the facts in this record in order to determine whether the capital sentencing jury's consideration of an invalid aggravating circumstance in the present case is harmless error beyond a reasonable doubt.

At Barber's trial, the jury found one remaining aggravating circumstance, that the murder was especially heinous, atrocious, or cruel in that it involved torture or depravity of mind, T.C.A. §39-2-203(1)(5)(1982). In State v. Williams, 690 S.W.2d 517 (Tenn. 1985), we said,

> [T]o show that the murder was especially heinous, atrocious or cruel the State must prove that it involved torture of the victim or depravity of mind of the killer.
>
> * * *
>
> "Torture" means the infliction of severe physical or mental pain upon the victim while he or she remains alive and conscious. In proving that such torture occurred, the State, necessarily, also proves that the murder involved depravity of mind of the murderer, because the state of mind of one who willfully inflicts such severe physical or mental pain on the victim is depraved.

Id. at 529. We conclude that the evidence overwhelmingly supports the jury's finding that the murder in this case involved torture and depravity of mind as defined in Williams.

The record shows that the victim, age seventy-five, lived alone in her home in Ridgely, Lake County, Tennessee. The victim's son testified that his mother had been in bad health for four or five years and that she had used a walker. The cause of death was multiple blows to the head and ensuing brain damage. There were at least five blows to the head,

possibly more. The wounds were consistent with injuries inflicted with a crescent wrench. Those to the back and left side of the head were associated with extensive skull fractures. In fact, the back of the victim's skull was virtually crushed. An inflammatory reaction present in all of the wounds indicated that they had been inflicted while the victim was alive. "Fresh" bruises on the back of both of the victim's hands were the result of "blunt trauma" and could also have been produced by a blow with a wrench.

Barber lived with his parents close to where the victim lived. Barber's brother-in-law testified that the Defendant had asked him to participate in a burglary involving "an old woman and that he'd have to kill her because she'd recognize him." The Defendant's sister heard the Defendant tell their mother that "he had to do it because she recognized him." The Defendant told an inmate in the Lake County jail that he "had to hit the old bitch four or five times to even get her down."

In this case the jury could permissibly infer that the victim was alive and conscious when she was repeatedly and brutally beaten based on Barber's statement that "I had to hit the old bitch four or five times to even get her down." Other evidence of the victim's consciousness would be the fact that fresh bruises to the back part of both hands were found. These defensive wounds more than likely were caused when the victim attempted to ward off the blows to her head. As in State v. Melson, 638 S.W.2d 342, 367, the proof shows that the victim had defensive injuries proving that there was time for

her to realize what was happening, to feel fear, and to try to protect herself.

The proof also firmly establishes that Barber willfully inflicted severe mental and physical pain on the victim. There was a great disparity in physical strength between Barber and the victim. Barber showed a total disregard for human life in the fierceness and atrocity of the attack, the number of blows inflicted, and the absence of any provocation by a helpless and defenseless victim. The willfulness of Barber's actions and the depravity of his mind at the time of the offense may be further inferred from the comments he made to others regarding the killing. The evidence clearly and overwhelmingly supports the remaining valid aggravating circumstance that the murder involved torture or depravity of mind. See, e.g., State v. Van Tran, 864 S.W.2d at 480; State v. McNish, 727 S.W.2d 490, 494 (Tenn. 1987).

We next look in our analysis to the extent to which the prosecutor emphasized the felony murder aggravating factor during closing argument. The felony murder aggravator was mentioned only one time during closing arguments.[1] The Assistant District Attorney's argument at sentencing focused on the heinous, atrocious, or cruel aggravator; and he cited the medical testimony of the pathologist describing the

[1]The only reference to the felony murder circumstance was the Assistant District Attorney's comment: "And that aggravating circumstance is that the murder was committed while the defendant was engaged in committing or was attempting to commit a larceny. If he was committing a larceny and she died during the commission of that larceny, that is an aggravating circumstance and you can consider it."

victim's wounds to support his argument. Defense counsel's closing argument dealt with the philosophy of the death penalty. In an emotional and compassionate plea for the Defendant's life, counsel walked the jury through the death row process and the final hours before electrocution. Attempting to respond to defense counsel's passionate argument, the District Attorney related his philosophy in support of the death penalty but made no reference to the invalid circumstance.

Another factor Howell teaches us to consider is "the evidence admitted to establish the invalid aggravator." As stated in Howell, "an aggravating factor which duplicates the elements of the underlying crime has less relative tendency to prejudicially affect the sentence imposed than invalid aggravating factors which interject inadmissible evidence into the sentencing calculus, or which require the sentencing jury to draw additional conclusions from the guilt phase evidence." 868 S.W.2d at 261. In this case, no additional evidence, nor any evidence that was not already properly before the jury to support the felony murder, was introduced in support of the invalid felony murder aggravator.

We next look to the nature, quality and strength of the mitigating evidence. The jury was charged to consider "the youth of the Defendant at the time of the crime," T.C.A. §39-2-203(j)(7), and that "the Defendant is a person capable of being rehabilitated." There was evidence in the record dealing with both mitigating circumstances, but it was insubstantial. Barber was 29 years old at the time of the

offense. It was shown that he was a welder and had behaved himself in prison in the past.

Based on our thorough review of the record, after careful analysis in conformity with Howell, we conclude, beyond a reasonable doubt, that the sentence would have been the same had the jury given no weight to the invalid felony murder aggravating factor. Therefore, since the invalidation of the aggravating circumstance is harmless beyond a reasonable doubt, we affirm the sentence of death.

The stay of execution previously issued is vacated and the sentence will be carried out as provided by law on the 10th day of January, 1995, unless otherwise ordered by this Court or by other proper authority. Costs are adjudged against the Appellant, Terry Barber.

FRANK F. DROWOTA, III
JUSTICE

Concur: Anderson.
Reid, J. See separate concurring opinion.
O'Brien, C.J.. See separate concurring opinion
Daughtrey, J., not participating.

FILED
OCT 03 1994
APPELLATE COURT CLERK
JACKSON

IN THE SUPREME COURT OF TENNESSEE

AT JACKSON

TERRY D. BARBER,
Appellant,

v.

STATE OF TENNESSEE,
Appellee.

LAKE CRIMINAL

No. 02S01-9212-CC-00086

CONCURRING OPINION

I concur with the lead opinion in this case while continuing to adhere to my dissent in the case of State v. Roosevelt Bigbee, ____S.W.2d ____ (Tenn. 1994), relative to the constitutionality of T.C.A. § 39-2-203(i)(7)(1982), (T.C.A. § 39-13-204(i)(7)(1991)) under Art. 1, § 16 of the Tennessee Constitution.

CHARLES H. O'BRIEN, Chief Justice

FILED
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JACKSON

FOR PUBLICATION

IN THE SUPREME COURT OF TENNESSEE

AT JACKSON

TERRY D. BARBER,
Appellant,

v.

STATE OF TENNESSEE,
Appellee.

Lake Criminal

Hon. Joe G. Riley, Jr., Judge

No. 02S01-9212-CC-00086

CONCURRING OPINION

This is a post-conviction proceeding, in which the petitioner seeks relief from his sentence of death on the ground that use of an invalid enhancement factor first recognized in State v. Middlebrooks, 840 S.W.2d 317 (Tenn. 1992), cert. dismissed, ____ U.S. ____, 114 S. Ct. 651 (1993), was a violation of his rights under Article I, Section 16 of the Tennessee Constitution.

I agree with the holding in the main opinion that State v. Meadows, 849 S.W.2d 748 (Tenn. 1993), makes the principle stated in Middlebrooks applicable to the petitioner's sentence. And, even though I do not agree with the analysis in the main opinion of the procedural or substantive law

applicable to this case, I concur in the judgment that the sentence be affirmed.

Lyle Reid, J.

APPENDIX D

FILED

NOV 28 1994

APPELLATE COURT CLERK
JACKSON

IN THE SUPREME COURT OF TENNESSEE

AT JACKSON

TERRY D. BARBER, Appellant,	)	NOT FOR PUBLICATION
v.	)	LAKE CRIMINAL
STATE OF TENNESSEE, Appellee.	)	No. 02S01-9212-CC-00086

ORDER ON PETITION TO REHEAR

A petition for rehearing has been filed on behalf of Appellant, Terry D. Barber. After consideration of the same, the Court is of the opinion that the petition should be, and the same hereby is, denied at the cost of Appellant. The members of the Court adhere to the positions stated in the original opinions filed in this cause. This November 28, 1994.

PER CURIAM

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No. 94-7254

IN THE UNITED STATES SUPREME COURT

OCTOBER TERM, 1994

Supreme Court, U.S.
FILED
DEC 14 1994
OFFICE OF THE CLERK

TERRY DWIGHT BARBER,

Petitioner

v.

STATE OF TENNESSEE,

Respondent

MOTION TO PROCEED IN FORMA PAUPERIS

Comes now the Petitioner, Terry Dwight Barber, and respectfully moves this Court to proceed *in forma pauperis*. Petitioner is indigent, and has been indigent throughout the course of the proceedings in the lower courts. An affidavit of indigency is attached to this motion.

Respectfully Submitted,

Capital Case Resource Center of
Tennessee
704 18th Avenue South
Nashville, Tennessee 37203
(615) 256-9780

By:

* Christopher M. Minton
Paul R. Bottei

* Counsel of Record

CERTIFICATE OF SERVICE

I hereby certify that the foregoing Motion has been forwarded by first-class mail, postage prepaid to the Office of the Attorney General, State of Tennessee, 450 James Robertson Parkway, Nashville, Tennessee 37243

Dated: 12/12/94

Chris M. Hart

ORIGINAL

No. 94-7254

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AFFIDAVIT IN SUPPORT OF MOTION TO PROCEED IN FORMA PAUPERIS

I, Terry Dwight Barber, being first duly sworn, depose and say that I am the Petitioner in the above-entitled case; that in support of my motion to proceed on appeal without being required to prepay fees, costs or give security therefor, I state that because of my poverty I am unable to pay the costs of said proceeding or to give security therefor.

I further swear that the responses which I have made to the questions and instructions below relating to my ability to pay the cost of prosecuting the appeal are true.

1. I am not presently employed. My last employment was in 1985, and my salary was $5.00 an hour.

2. I have received no income within the past twelve months from a business, profession or other form of self-employment, or in the form of rent payments, interest, dividends, or other sources.

3. I own no cash or checking or savings accounts.

4. I own no real estate, stocks, bonds, notes, automobiles, or other valuable property.

5. No one is dependent upon me for support.

I understand that a false statement or answer to any questions in this affidavit will subject me to penalties for perjury.

Terry D. Barber

Terry Dwight Barber

SWORN TO AN SUBSCRIBED TO before me this 9th day of December, 1994.

Juanita H. Pierce

Notary Public

My commission expires 11-25-95